APPENDIX A

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 69,116

IN THE MATTER OF THE APPEAL OF ANR PIPELINE COMPANY; COLORADO INTERSTATE GAS COMPANY; NORTHERN NATURAL GAS COMPANY; MAPCO FRACTIONATOR, INC.; MAPCO AMMONIA PIPELINE, INC.; MID-AMERICA PIPELINE COMPANY; and ENRON LIQUIDS PIPELINE COMPANY From a Decision of THE DIRECTOR OF PROPERTY VALUATION of THE STATE OF KANSAS.

SYLLABUS BY THE COURT

1. In making a determination of federal preemption, a court should examine those concerns emphasized by Congress in enacting the legislation. State law should be preempted only to the extent necessary to protect achievement of the purposes of the federal act in question.

2. An order of the Board of Tax Appeals denying pipeline companies the favorable state tax treatment afforded railroads by federal law and a federal court consent decree thereunder is considered and held not to be violative of: (1) the Uniform and Equal Clause of art. 11, § 1 of the Kansas Constitution; (2) the Equal Protection Clauses of the United States and Kansas Constitutions; or (3) the Commerce Clause of the United States Constitution.

Appeal from the Kansas Board of Tax Appeals. Opinion filed January 21, 1994. Affirmed.

Richard D. Greene, of Morris, Laing, Evans, Brock & Kennedy, Chartered, of Wichita, argued the cause, and *Robert W. Coykendall,* of the same firm; *Karen Pauley, Virginia Amend,* and *Nancy Morgan,* of ANR Pipeline Company and Colorado Interstate Gas Company, of Colorado Springs, Colorado; *E. Chris Kaitson,* of Northern Natural Gas Company and Enron Liquids Pipeline Company, of Houston, Texas; and *Charlene Sinclair,* of MAPCO Fractionator, Inc., MAPCO Ammonia Pipeline, Inc., and Mid-America Pipeline Company, of Tulsa, Oklahoma, were with him on the briefs for appellants.

William E. Waters, of Kansas Department of Revenue, of Topeka, argued the cause, and *Laura E. Johnson,* of the same department, were with him on the brief for appellee.

Benjamin J. Neill and *Thomas H. Bornholdt,* of Neill, Bornholdt & Terrill, of Overland Park, were on the brief for *amicus curiae* Kansas Association of Counties.

Lisa Ross Wetzler, assistant county counselor, Johnson County, was on the brief for *amici curiae* Board of County Commissioners of Johnson County, Kansas, and County Appraiser of Johnson County, Kansas.

The opinion of the court was delivered by

McFARLAND, J.: The appellants herein, with one exception, are open access common carriers that transport fuels in interstate commerce. The one exception, Mapco Fractionator, Inc., provides fractionating services to shippers of natural gas. Each is classified as a public utility for real and personal property tax purposes. Each was unsuccessful in its effort before the Director of Property Valuation (DPV) to have its property assessed on the same bases as is railroad property. Appeals were taken to the Board of Tax Appeals (BOTA), which upheld the decisions of the DPV. The appellants appeal from said

BOTA order. The appellants contend the BOTA order is in violation of the uniform and equal requirement of art. 11, § 1 of the Kansas Constitution, the Equal Protection Clauses of the Kansas and United States Constitutions, and the Commerce Clause of the United States Constitution.

The appeals were presented to BOTA on stipulated facts. Here, as there, only questions of law are presented for determination. The circumstances giving rise to the controversies herein may be stated as follows. The tax years 1990 and 1991 are involved. At all pertinent times, art. 11, § 1(b) of the Kansas Constitution provided:

> "(1) The provisions of this subsection (b) shall govern the assessment and taxation of property on and after January 1, 1989, and each year thereafter. Except as otherwise hereinafter specifically provided, the legislature shall provide for a uniform and equal basis of valuation and rate of taxation of all property subject to taxation. The provisions of this subsection (b) shall not be applicable to the taxation of motor vehicles, except as otherwise hereinafter specifically provided, mineral products, money, mortgages, notes and other evidence of debt and grain. Property shall be classified into the following classes for the purpose of assessment and assessed at the percentage of value prescribed therefor:
>
> "Class 1 shall consist of real property. Real property shall be further classified into four subclasses. Such property shall be defined by law for the purpose of subclassification and assessed uniformly as to subclass at the following percentages of value:
>
> (A) Real property used for residential purposes including multi-family residential real property 12%
>
> (B) Land devoted to agricultural use which shall be valued upon the basis of its argicultural

income or agricultural productivity pursuant to section 12 of article 11 of the constitution 30%

(C) Vacant lots 12%

(D) All other urban and rural real property not otherwise specifically subclassified 30%

"Class 2 shall consist of tangible personal property. Such tangible personal property shall be further classified into six subclasses, shall be defined by law for the purpose of subclassification and assessed uniformly as to subclass at the following percentages of value:

(A) Mobile homes used for residential purposes 12%

(B) Mineral leasehold interests 30%

(C) Public utility tangible personal property .30%

(D) All categories of motor vehicles not defined and specifically valued and taxed pursuant to law enacted prior to January 1, 1985 ..30%

(E) Commercial and industrial machinery and equipment which, if its economic life is seven years or more, shall be valued at its retail cost when new less seven-year straight-line depreciation, or which, if its economic life is less than seven years, shall be valued at its retail cost when new less straight-line depreciation over its economic life, except that, the value so obtained for such property, notwithstanding its economic life and as long as such property is being used, shall not be less than 20% of the retail cost when new of such property 20%

(F) All other tangible personal property not otherwise specifically classified 30%

"(2) All property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, farm machinery and equipment, merchant's and manufacturer's inventories and livestock and all household goods and personal effects not used for the production of income, shall be exempted from property taxation."

This article was substantially amended in 1992, effective January 1, 1993, but said amendments are not at issue herein.

Under the provisions applicable herein, real and personal property owned by public utilities was to be assessed at 30 percent. The appellants and railroads are public utilities. K.S.A. 79-5a01.

In 1976, Congress enacted the Railroad Revitalization & Regulatory Reform Act of 1976 (Pub. L. 94-210, 90 Stat. 31, 54-5 [codified at 49 U.S.C. § 11503 (1988]). The Act, commonly referred to as the 4-R Act, provides, in pertinent part:

"(a) In this section—

(1) 'assessment' means valuation for a property tax levied by a taxing district.

(2) 'assessment jurisdiction' means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) 'rail transportation property' means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title [49 U.S.C. §§ 10501 *et seq.*].

(4) 'commercial and industrial property' means property, other than transportation property and land used primarily for agricultural purposes or

timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

"(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title [49 U.S.C. §§ 10501 *et seq.*].

"(c) Notwithstanding section 1341 of title 28 [28 U.S.C. § 1341] and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the

ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section—

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district."

The purpose of the 4-R Act was to prohibit discriminatory taxation of railroad real and personal property by state and local property tax laws and to promote the revitalization of the railway system nationwide. See *Clinchfield R. Co. v. Lynch,* 784 F.2d 545, 551 (4th Cir. 1986); *State of Ariz. v. Atchison, T. & S.F.R. Co.,* 656 F.2d 398, 400 (9th Cir. 1981).

The 4-R Act spawned years of federal litigation wherein railroads sought to utilize it to reduce their real and personal property taxes in Kansas. See, *e.g., Atchison, Topeka & S.F.Ry. Co. v. Lennen,* 640 F.2d 255 (10th Cir. 1981); *Atchison, Topeka and Santa Fe Ry. Co. v. Lennen,* 552 F. Supp. 1031 (D. Kan. 1982), *aff'd in part, rev'd in part* 732 F.2d 1495 (10th Cir.

1984); *Atchison, T. & S.F.Ry. Co. v. Lennen,* 531 F. Supp. 220 (D. Kan. 1981).

That litigation ended in 1989 with the entry of consent decrees. The parties rely on the decree entered on August 11, 1989, in *Burlington Northern Railroad Company v. Rolfs,* D. Kan., No. 89-4124-R, filed August 11, 1989. The effect of this decree was to fix the railroads' assessment rate for real property at 25 percent for 1990 and 22.3 percent for 1991. The parties have stipulated that 80 percent of the railroads' personal property was exempted from taxation with the balance of 20 percent to be assessed at 30 percent of the value. Like BOTA, we are at a loss from the record to see the basis for this exemption, but accept the parties' stipulation for the purposes of this appeal.

The appellants' basic position is quite simple and direct. They believe they are entitled to the same deal the railroads received for the tax years 1990 and 1991 as a result of the consent decree. There is no challenge herein to any portion of the decree. The appellants are seeking only to be taxed on the same basis as to their real and personal property for the years in dispute in the respective cases.

UNIFORM AND EQUAL

For their first issue, appellants contend that the disparate treatment between pipelines and railroads violates the Kansas constitutional mandate of uniform and equal treatment among members of the same subclass. Under art. 11, § 1(b), pipeline and railroad real estate are in subclass (D) to be assessed on the basis of 30 percent of value, and their tangible personal property is in subclass (C), also to be assessed at 30 percent of value.

For many years art. 11, § 1 provided that all property was to be assessed on a uniform basis with exceptions thereto being limited to particular types of property, regardless of ownership.

Under this system, for example, typewriters of the same make and model, purchased the same day, should be assessed at the general rate regardless of the nature of the usage thereof by the respective owner. It would matter not whether a particular typewriter was owned by a public utility, a manufacturer of goods, or a grocery store. The philosophy underlying this concept was set forth in *Wheeler v. Weightman,* 96 Kan. 50, 58, 149 Pac. 977 (1915), as follows:

> "The essentials [of the Uniform and Equal Clause] are that each man in city, county, and state is interested in maintaining the state and local governments. The protection which they afford and the duty to maintain them are reciprocal. The burden of supporting them should be borne equally by all, and this equality consists in each one contributing in proportion to the amount of his property. To this end all property in the state must be listed and valued for the purpose of taxation, the rate of assessment and taxation to be uniform and equal throughout the jurisdiction levying the tax."

Under the 1985 amendments to art. 11, § 1, real estate was essentially classified by usage, and personal property was essentially classified by ownership. This basic alteration in the scheme of taxation must be borne in mind when reading our earlier cases.

The appellants contend that one of these cases, *Voran v. Wright,* 129 Kan. 601, 284 Pac. 807 (1930), is dispositive of this issue. We do not agree. The DPV and the *amici* herein contend *Voran* is inapplicable. Their reasons vary. The pertinent portion of art. 11, § 1 involved in *Voran* was as follows:

> "The legislature shall provide for a uniform and equal rate of assessment and taxation, *except that mineral products, money, mortgages, notes and other evidence of debt may be classified and taxed uniformly as to class as the legislature shall provide.* All

> property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and personal property to the amount of at least two hundred dollars for each family, shall be exempted from taxation." (Emphasis in original.) 129 Kan. at 606.

Of this provision the *Voran* court stated:

> "Whatever may have been proper as to classification of owners under this section before the amendment, there can no longer be any question in that regard. A classification as to owners is not now permissible. The only classification authorized or tolerated by this constitutional provision is that of property, and it makes no difference by whom it may be owned, whether by individual, merchant, manufacturer, banking institution or other corporation. Every classification is now limited to property, and only four kinds of property, viz., mineral products, money, mortgages, notes and other evidence of debt." 129 Kan. at 606-07.

The underlying problem in *Voran* was the taxation of the property of national banks. Of this the *Voran* court stated:

> "National banks, being governmental agencies, would not be subject to a tax imposed by the state, and the only way to reach the property of national banks was by an indirect method sanctioned by this act of congress. It is argued that the state could have taxed the shares of stock in national banks without the permission thus granted by congress, but it has been granted with requirements and restrictions, and this state and all others have attempted to comply with the restrictions and terms imposed rather than try to accomplish the same in disregard of such consent, even if it could have been so done.

"Instead of taxing the national bank on the valulation of its property, the act authorizes the state to tax its shares of stock against the holders thereof, but the act expressly prescribes that such tax shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state coming into competition with the business of national banks. This act is known as section 5219 of the Revised Statutes of the United States, which was amended in 1923 and again in 1926, and is in part as follows:

'Sec. 5219. The legislature of each state may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several states may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

'1. (a) The imposition by any state of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

'(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state coming into competition with the business of national banks: *Provided,* That bonds, notes or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business,

> shall not be deemed moneyed capital within the meaning of this section.' " 129 Kan. 605-06.

In the effort to comply with the federal law and thus reach national bank property for taxation purposes, the Kansas Legislature enacted certain statutes. A federal court held that shareowners of national banks could not be subjected to the general ad valorem tax rate under section 5219. This left state bank shareowners being assessed at the general rate and national bank shareowners being assessed on the lower intangible tax rate. The *Voran* court, applying the constitutional provisions in effect at the time, held certain portions of one of the statutes unconstitutional and thereby permitted the plaintiff owners of state bank shares to be taxed at the intangibles tax rate, as were their counterparts owning national bank shares.

Voran is distinguishable in a number of respects from the situation before us. National bank property at the time in *Voran* was not taxable except by compliance with the federal act. Art. 11, § 1, in the form in effect in *Voran,* did not contain a classification system. There were no exceptions to the general rate other than for mineral products, money, mortgages, notes, and other evidence of debt which the legislature could classify and take uniformly throughout the particular class. Shares of stock were in none of these exceptions. The present form of art. 11, § 1 classifies real and personal property based in part upon usage or ownership.

The 4-R Act, as it applies to Kansas and as reflected in the consent decree, simply required that railroad property be assessed at no higher rate than commercial or industrail property. Railroad property was thereby made an exception to subclasses to which public utility property was assigned. This exception was amended into art. 11, § 1 in 1992, where the public utility real property subclass and the commercial and industrial subclasses provide:

"(5) Public utility real property, except railroad real property which shall be assessed at the average rate that all other commercial and industrial property is assessed 33%

"(6) Real property used for commercial and industrial purposes and buildings and other improvements located upon land devoted to agricultural use .....25%"

Likewise in the 1992 amendment, personal property subclasses for public utility and commercial and industrial property provide:

"(3) Public utility tangible personal property included inventories thereof, except railroad personal property including inventories thereof, which shall be assessed at the average rate all other commercial and industrial property is assessed 33%

....

SUPPLEMENTAL INFORMATION:

"(5) Commercial and industrial machinery and equipment which, if its economic life is seven years or more, shall be valued at its retail cost when new less seven-year straight-line depreciation, or which, if its economic life is less than seven years, shall be valued at its retail cost when new less straight-line depreciation over its economic life, except that, the value so obtained for such property, notwithstanding its economic life and as long as such property is being used, shall not be less than 20% of the retail cost when new of such property .....25%"

We agree with appellants that a "uniform and equal" requirement has been constant in art. 11, § 1, but there has been a pertinent shift in the application of the re-

quirement. In *Voran,* art. 11, § 1 essentially had all property in one grouping with certain specific types of property being excepted therefrom for classification, if the legislature desired. The *legislature was charged with providing a uniform and equal rate* of assessment and taxation for the general group and to tax the excepted types of property uniformly within their respective class. In contrast, the form of art. 11, § 1 before us *classifies all real and personal property* and *fixes the assessment rate for each subclass.* The legislature is charged with providing only a *uniform and equal basis for valuation and rate of taxation.* Thus, rate of assessment for particular property is now contained within the article and is not a matter for the legislature to determine on a uniform and equal basis. Under the article, public utility property is assessed at 30 percent.

This distinction has much to do with the result reached in *Voran.* Bank shares, not being in an exception, would ordinarily be in the general group. To bring national bank shares into the tax base, the legislature enacted legislation which ran afoul of federal law and resulted, as a result of a federal court decision, in state bank shares being taxed on a different basis than federal bank shares. Portions of the statutes which had led to this result were held violative of the legislature's duty to provide a uniform and equal rate of assessment and taxation.

In the case before us, the 4-R Act placed limitations on state taxation of railroad property. Railroad property had to be treated the same as "other commercial and industrial property." There can be little doubt that this is a preemption. If it is not a preemption, the 4-R Act is just a piece of paper suggesting railroads should be treated like other commercial and industrial property and the enforcement section thereof is surplusage. Clearly, that was not the Congressional intent in enacting the 4-R Act.

In *Goben v. Barry,* 237 Kan. 822, Syl. ¶ 3, 703 P.2d 1378 (1985), a preemption case, we held:

> "In making a determination of federal preemption, a court should examine those concerns emphasized by Congress in enacting the legislation. State law should be preempted only to the extent necessary to protect achievement of the purpose of the federal act in question."

The purpose of the 4-R Act was to benefit and revitalize railroads. The brief of the Department of Revenue states pipeline companies attempted unsuccessfully to obtain like federal legislation in their favor. The statement is not disputed. In any event, there is absolutely no indication in the record that Congress intended, by the enactment of 4-R, to preempt or affect how pipeline property was assessed or taxed by the states. Limiting the presumption of the 4-R Act to its purposes and application results in minimal interference with the classification system provided by art. 11, § 1.

The appellants argue that we should adopt the rationale of the Nebraska Supreme Court in *Northern Natural Gas Co. v. State Bd. of Equal.,* 232 Neb. 806, 443 N.W.2d 249 (1989). Nebraska held in favor of the pipelines in their quest to be afforded the same favorable treatment as railroads under the 4-R Act. We decline to do so. The Nebraska Constitution does not have property classifications and is more akin to art. 11, § 1 in the form applicable in *Voran.* We do not find the Nebraska rational persuasive on this issue.

In *Federal Exp. Corp. v. Tennn. State Bd.,* 717 S.W.2d 873 (Tenn. 1986), the Tennessee Supreme Court rejected a similar challenge on "uniform and equal" grounds. This case will be discussed in more detail in the next issue.

We conclude that the BOTA order refusing to afford the appellants their requested relief of having their prop-

erty assessed on the same basis as railroads is not violative of the uniform and equal provision of art. 11, § 1 of the Kansas Constitution.

EQUAL PROTECTION

For their second issue, appellants contend that BOTA order is violative of the Kansas and United States Constitutions' Equal Protection Clauses.

The 14th Amendment of the United States Constitution provides that no state can make or enforce a law which shall deny to any person within its jurisdiction the equal protection of the laws. Section 1 of the Bill of Rights of the Kansas Constitution provides: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Appellants do not argue the Kansas Constitution grants them any greater rights herein than does the United States Constitution. In the following discussion, we will refer only to the United States Constitution, but such discussion should be considered as being equally applicable to the Kansas Constitution argument.

Similar arguments were raised in two cases in other jurisdictions and rejected.

In *State v. Colonial Pipeline Co.*, 471 So. 2d 408 (Ala. Civ. App. 1984), the Alabama Court of Civil Appeals considered an oil pipeline's challenge to the assessment of its property at the public utility rate, which was the highest rate under Alabama's classification system. Colonial contended, *inter alia* that assessment of railroad property which was in the same classification as the pipeline at a lesser rate by virtue of the 4-R Act was violative of the Equal Protection Clause of the United States Constitution. The Alabama court stated:

> "If there may be some discrimination against Colonial, it is not arbitrary or unreasonable. Until the

state was specifically forbidden to tax the property of railroads at a higher assessment ratio than other commercial and industrial property by Congress in 49 U.S.C.A. § 11503, it classified the property of railroads as Class I property. Moreover, until forbidden to do so by the Circuit Court of Montgomery County in *Delta Airlines v. Department of Revenue,* Civil Action No. CV-80-116-G, the Department classified the property of airlines as utilities and taxed them as Class I property. The Tax Equity & Fiscal Responsibility Act of 1982, § 532 amending 49 U.S.C. § 1513(b) and (d), now has the effect of forbidding the state from assessing property of air carriers at a higher rate than other commercial and industrial property.

"Currently, the state is specifically forbidden to classify the property of motor carriers as Class I property by 49 U.S.C. § 11503a, which gives the motor carriers the same protection from high assessment rates that is afforded railroads and air carriers. Were it not for the supremacy of federal statutes over state law, airlines, trucklines and railroads, which are included in § 40-21-1, would be subject to the same Class I classification as is assigned Colonial's property. The preemption for tax purposes of those other entities does not destroy the classification by state law from which they were exempted and to which Colonial continues to belong." 471 So. 2d at 412-13.

In *Federal Exp. Corp. v. Tenn. State Bd.,* 717 S.W.2d 873, a taxpayer challenged its property assessment as a public utility rather than as commercial and industrial property. While ruling that the plaintiff taxpayer was a "public utility" for ad valorem taxation, the Tennessee Supreme Court turned aside the taxpayer's equal protection argument, stating:

> "Federal Express also argues that to assess its property for ad valorem tax purposes at 55% of its value, while assessing the property of railroads at the industrial and commercial rate of 30% of value, violates the Equal Protection Clause of the United States Constitution and Article II, Section 28 of the Tennessee Constitution, which requires 'the ratio of assessment to value of property in each class or subclass shall be equal and uniform throughout the state." The legislature classified railroads as public utilities and assessed them for ad valorem tax purposes at 55% of the value of their properties. However, the Congress of the United States, by Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11503 ('4-R Act'), preempted the state classification of railroads and provided that they should be taxed as industrial and commercial property are taxed. The Act, having as its purpose the revitalization of railroads, affected only that business. Thus leaving in effect the state classification of other businesses as public utilities. The assessment of each of the businesses classed as public utilities is at the same ratio to value as the assessment of Federal Express property; consequently, we find no violation of either Article II, Section 28 of the Tennessee Constitution or the Equal Protection Clause of the Federal Constitution." 717 S.W.2d at 875-76.

To buy the appellants' argument, we would have to conclude the 4-R Act, in essence, eliminated the public utility subclass of personal property and transferred the same to the commercial and industrial subclass and made a major alteration to the "all other" subclass relative to real property. Again, appellants rely on the Nebraska case of *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, which held that taxing pipeline property on a different basis than railroad property was violative of the Equal Protection Clause as well as the uniform

and equal state constitutional requirement. Again, we find the Nebraska opinion unpersuasive.

Art. 11, § 1 treats all public utility property alike. The 4-R Act affects only railroad property and preempts the classification only as to such property.

Appellants complain that BOTA did not address its equal protection arguments in the order entered. It is true the BOTA order does not specifically refer to the equal protection argument as such, but, from the language employed therein and the cases cited, it is clear such was considered.

We conclude that the BOTA order is not violative of the Equal Protection Clauses of the United States or Kansas Constitutions.

COMMERCE CLAUSE

For their third issue, appellants contend the BOTA order is violative of the Commerce Clause of the United States Constitution.

The Commerce Clause provides that the "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. State regulation that is contrary to the constitutional principle of insuring that the conduct of individual states does not work to the detriment of the nation as a whole is invalid under the dormant Commerce Clause. *Wardair Canada v. Florida Dept. of Revenue,* 477 U.S. 1, 7-8, 91 L. Ed. 2d 1, 106 S. Ct. 2369 (1986).

Appellants assert that the property tax imposed by the State of Kansas upon pipeline property violates the Commerce Clause of the United States Constitution because the tax is discriminatory and unduly burdensome upon interstate commerce and violative of the third and fourth prongs of the four-prong test enumerated in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977). The four-

prong test enumerated in *Complete Auto* is: (1) The tax must be applied to an activity with a substantial nexus with the taxing state; (2) the tax must be fairly apportioned; (3) the tax must not discriminate against interstate commerce; and (4) the tax must be fairly related to the services provided by the state. 430 U.S. at 279.

Appellants' argument on this issue lacks focus. Much of it seems to be a broad criticism of the classification system itself without any reference to railroads or the 4-R Act. This argument is difficult to understand. Public utility real estate is in the "all other" subclass which includes everything but residential property, agricultural land, and vacant lots. Public utility personal property has its own subclass. Pipeline operations crossing only county lines are assessed at the same rate as are those crossing state lines. Kansas Const., art. 11, § 1, K.S.A. 79-5a01. Pipeline property is valued by the unit valuation method and that valuation is apportioned to Kansas based on the percentage the pipeline company's original cost in Kansas bears to the total original cost of the company. See K.S.A. 79-5a04. Thus, as required by *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 69 L. Ed. 2d 884, 101 S. Ct. 2946 (1981), a pipeline company's property is assessed in Kansas in proportion to the pipeline's presence in the state.

The facts herein do not support a serious challenge based upon the Commerce Clause. The appellants contend the DPV and BOTA violated the Commerce Clause by not giving them the tax advantage that the 4-R Act mandated for the railroads. The appellants and the railroads are all engaged in interstate commerce. Kansas treated them alike in its constitution and in its statutory definition of public utilities. Congress chose to favor the railroads by enactment of the 4-R Act. Congress is the source of the alleged discrimination underlying this appeal. Appellants do not challenge the 4-R Act or the

consent decree thereunder. Rather, they want to ride piggyback to gain the same tax treatment in Kansas.

We find no violation of the Commerce Clause in BOTA's refusal to extend the 4-R Act and the federal court order to appellants and to order appellants' property be assessed on the same basis as railroad property.

We conclude that the BOTA order is not violative of the Commerce Clause of the United States Constitution.

The order of the Board of Tax Appeals is affirmed.

ABBOTT, J., not participating.

PRAGER, C.J., Retired, assigned.

APPENDIX B

BEFORE THE BOARD OF TAX APPEALS
OF THE STATE OF KANSAS

Docket No. 90-8930-PV and 91-6733-PV

IN THE MATTER OF THE APPEAL OF ANR PIPELINE COMPANY, FROM AN ORDER OF THE DIRECTOR OF PROPERTY VALUATION.

Docket No. 90-8927-PV and 91-6734-PV

IN THE MATTER OF THE APPEAL OF COLORADO INTERSTATE GAS COMPANY, FROM AN ORDER OF THE DIRECTOR OF PROPERTY VALUATION.

Docket No. 90-8926-PV and 91-6584-PV

IN THE MATTER OF THE APPEAL OF NORTHERN NATURAL GAS COMPANY, FROM AN ORDER OF THE DIRECTOR OF PROPERTY VALUATION.

Docket No. 91-6730-PV

IN THE MATTER OF THE APPEAL OF MAPCO FRACTIONATOR, INC., FROM AN ORDER OF THE DIRECTOR OF PROPERTY VALUATION.

Docket No. 91-6731-PV

IN THE MATTER OF THE APPEAL OF MAPCO AMMONIA PIPELINE, INC., FROM AN ORDER OF THE DIRECTOR OF PROPERTY VALUATION.

Docket No. 91-6732-PV

IN THE MATTER OF THE APPEAL OF MID-AMERICA PIPELINE COMPANY, FROM AN ORDER OF THE DIRECTOR OF PROPERTY VALUATION.

Docket No. 91-6585-PV

IN THE MATTER OF THE APPEAL OF ENRON LIQUIDS PIPELINE COMPANY, FROM AN ORDER OF THE DIRECTOR OF PROPERTY VALUATION.

ORDER

Now, on this 26th day of October, 1992, the above captioned matter comes on for consideration and decision by the Board of Tax Appeals of the State of Kansas.

The Board being fully advised in the premises, finds and concludes as follows:

1. The Board has jurisdiction of the subject matter and of the parties, a proper and timely appeal having been filed, pursuant to K.S.A. 74-2438.

2. The subject of this appeal challenges the Property Valuation Director's order certifying unit values for 1990 and 1991.

3. Each of the appellants are owners and operators of property classified as public utilities within the language of Article 11, Section 1(b), Class 1(D) (real estate) and Class 2(C) (personal property) and K.S.A. 79-5a01(a).

Findings of Fact

4. The parties entered into a series of stipulations at various times prior to the submission of these appeals. The Board finds that the proposed stipulations should be accepted as true, although we also note that some of the facts stated are not material to the decision reached here. The facts will not be restated except as necessary to the discussion of the issues.

Limitation of the Issues

5. Pursuant to the Stipulations submitted, the parties restricted the ambit of this appeal to certain issues. These grounds omitted from our consideration should be noted. The parties do not contest the appraisal or determination of value for either property owned by them or property owned by railroad companies. In other words, it is not alleged that the Division of Property Valuation appraised the property in an arbitrary or capricious manner. This is relevant in that some prior determinations rested on the ground that action by the appraising officials was so arbitrary as to constitute fraud. See *Board of Johnson County Comm'rs v. Greenhaw*, 241 Kan. 119, 734 P.2d 1125 (1987); *Commercial National Bank v. Board of County Commissioners*, 201 Kan. 280, 440 P.2d 634 (1968).

6. The parties agree that Kansas Constitution, Article 11, Section 1(b) classifies both railroads and these appellants in the same sub-classification of property.

7. The parties also agreed that railroad companies are assessed in Kansas pursuant to an Order Enjoining Assessment, Levy or Collection of Discriminatory Taxes, U.S. Dist. Ct., Kan. Docket No. 89-4124-R (Consent Decree) made part of the record by stipulation. A plain reading of the Consent Decree shows that real property owned by railroad companies is assessed at the rate of 25% for 1990 and 22.3% for 1991. Personal property owned by railroad companies is allegedly granted the benefit of exemption for 80% of their personal property in both years. Since these are stipulations among the parties, we shall not disturb their agreements. We note, however, that no evidence shows that the unit values certified for railroad companies reveals the method or amount of value removed as a result of personal property 'exemption'.

8. Finally, the parties agree that if a reduction in the level of assessment is found to be appropriate for these appellants, the same reduction in rates of assessment should be made as was allowed by the Consent Decree for railroads. The parties reserved questions related to the validity of the reduction ordered by the Consent Decree.

Statement of the Issue

9. The question presented is narrow. Given that property owned by railroad companies is assessed as an amount less than 30%, does the United States or Kansas Constitution require that other public utility property be assessed at similar rates?

Conclusions of Law

10. Even though reserved by the parties, we find it necessary to discuss the basis stated for reduction in the level of assessment for railroad property in the Consent Decree. The Decree is purportedly

authorized by the language of 49 U.S.C. Sect. 11503 (commonly known as the 4-R Act) barring discrimination against railroads under state tax statutes. The specific reductions in assessment rates are premised on the state sales ratio study and exemptions afforded non-railroad personal property. No other ground for the reduced assessment is contained in the Decree.

11. Kansas Courts have long held that reliance on the sales ratio study as a ground for reduced value or level of assessment is insufficient as a matter of law. *Northern Natural Gas Co. v. Williams,* 208 Kan. 407, 493 P.2d 568 (1972); *cert. den.* 406 U.S. 947, 92 S.Ct. 2408, 32 L.Ed. 2d 665; *Northern Natural Gas Co. v. Dwyer,* 208 Kan. 337, 492 P.2d. 147 (1971) *cert. den.* 406 U.S. 947, 92 S.Ct. 2408, 32 L.Ed. 2d 665; With respect to state taxation law, federal courts recognize that each state is free to propose and implement their own tax schemes without interference from federal authorities. Thus, the discretion to release certain property from the burden of taxation is unfettered unless in violation of the U.S. Constitution. "The State's power to classify is, indeed, extremely broad, and its discretion is limited only by constitutional rights and by the doctrine that a classification may not be palpably arbitrary." *Phillips Chemical Co. v. Dumus Independent School District,* 361 U.S. 376, 80 S.Ct. 474, 4 L.Ed. 2d 384 (1959). Kansas Constitution, Article 11, Section 1 provides a specific exemption to the exact same classes of personal property listed in the Decrees. No claim is made in this case that Kansas tax law violates the U.S. Constitution. The argument is that if railroads are afforded a reduced level of assessment, then other utility properties must be afforded the same treatment. In fact, the very premise of these appel-

lants is that the Decree is an appropriate result. It is fair to say that the appellant's request is that the ambit of the Decree be expanded to include other public utility property.

12. We are not at all convinced that the Decree represents a valid application of the 4-R Act, nor that the result complies with the body of Kansas decisions. There is no evidence to examine outside of the Decree. Nonetheless, if the underlying premise, which assumes that the Decree is valid, is false, then expansion of the doctrine merely exacerbates discrimination created by the Decree.

13. It is possible that the Decree is a fair settlement of the railroad owner's claim of discrimination. The result of that settlement is that railroad real property is assessed at less than 30% and the personal property is assessed at 20% of its contribution to the unit. In that context, we are required to examine whether the assessment of other public utility property may be assessed at 30% of fair market value.

14. It is obvious that a difference exists in the level of assessment between railroad property and other public utility property after the Decree. The appellants suggest that this difference is untenable when matched against Kansas and federal constitutional standards.

15. Appellants cite several cases for the proposition that discrimination is unconstitutional if it is the result of conscious and knowledgeable action by assessing officials. *Voran v. Wright,* 129 Kan. 601, 284 P. 807 (1930); *Von Ruden v. Miller,* 231 Kan. 1, 642 P.2d 91 (1982); *Addington v. Board of County Commissioners,* 191 Kan. 528, 382 P.2d 315 (1963).

16. Kansas Courts have long recognized that discrimination may exist, but only where a rational basis for such disparity is found. *State ex. rel. Stephan v. Martin,* 227 Kan. 456, 608 P.2d 880 (1980); *Commercial National Bank v. Board of County Commissioners,* 201 Kan. 280, 440 P.2d 634 (1968); *Wesley Medical Center v. McCain,* 226 Kan. 263, 597 P.2d 1088 (1979); *Missouri Pacific Railroad Co. v. McDonald,* 207 Kan. 744, 486 P.2d 1347 (1971). Federal Courts also apply the same standard of review. *Allegheny Pittsburgh Coal Co. v. County Commissioner of Webster County, West Virginia,* 488 U.S. 336, 102 L.Ed.2d 688, 109 S.Ct. 633 (1989); *Nordlinger v. Hahn,* 60 U.S.L.W. 4563 (June, 1992). Further, the various states are granted discretion to classify property for their own taxation purposes. *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356 (1973); *Ohio Oil Co. v. Conway,* 281 U.S. 146, 74 L.Ed. 775, 50 S.Ct. 310 (1930). Our task, then, is to discover whether a rational basis can be found for the difference in assessment.

17. The change in assessment for railroads is premised solely on the presence of the 4-R Act (49 U.S.C. 11503). That Act provides:

> "The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of State may not do any of them:
>
> (1) assess rail transportation property at a value that has a higher ratio to the true market of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

18. Pipeline and other utility companies have not been as successful in their lobbying of Congress as the railroads. The Respondent's Brief traces the legislative history of legislation similar to 4-R, but favoring pipeline or other utility operators. The end result is that railroads are unique in the field of utilities in that they have the benefit of federal legislation whereas all other utilities do not. We find that the substance of this appeal is to create, by implication, that which Congress has specifically considered and rejected.

19. Is it appropriate that the Board or even Kansas take into account the presence of the 4-R Act? We think so. The appellants argue that federal preemption is not favored and should be avoided where possible. *Chicago and N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). In *Goben v. Barry*, 237 Kan. 822, 703 P.2d 1378 (1985) the Kansas Court agreed: "State law should be preempted only to the extent necessary to protect achievement of the purposes of the federal act in question."

20. The 4-R Act specifically adopts a standard of discrimination unprecedented in Kansas tax law,

e.g. [not to] "assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property". This test is similar to the criteria reviewed by the *Williams* court and rejected as legally insufficient. Nonetheless the Board finds that Congress is empowered to act in this area and that the legislation is entitled to some comity.

21. Does the 4-R Act or the Constitution mandate an expansive application of to [sic] public utilities? We think not. *Goben* makes clear that recognition of federal acts shall be limited to the clear import of their provisions and no more. It is also clear that Congress cannot be charged with an implied intent to afford similar treatment to other public utilities.

22. We view this case as similar to the decision in *Gordon v. Hiett,* 214 Kan. 690, 522 P.2d 942 (1974) wherein the Court determined that property assessed in excess of the statutory rate should be reduced to the level of assessment authorized by statute. The *minority* view expressed in *Gordon* would have reduced the level of assessment to the median or average assessment rate, but obviously that option was rejected by the *Gordon* Court. This Board does not ignore that the Kansas Constitution has been amended to allow classification of property among various classes since the *Gordon* decision. However, the principles of uniformity *within a class* continue to apply, in our view.

23. What we are required to enforce is uniformity within the class of utility property, both real and

personal. However, the presence of federal legislation adopting a different standard for railroad property and no other utility property not only creates, but compels, a distinction to be made. We conclude that the 4-R Act creates an exception within the class of public utility property. We also conclude that the congressional distinction between railroads and other utilities is a reasonable ground for different treatment. Faced with this development in the law, Kansas Courts have consistently maintained that differences in treatment should be minimized to the extent possible. *State ex. rel. v. Dwyer,* 208 Kan. 437, 493 P.2d 1095 (1972).

24. Kansas cases plainly state that uniformity is to be enforced to the extent possible. *Von Ruden, supra*; *Dwyer, supra.* Here, however, the 4-R Act purportedly requires departure from the 30% standard set by Kansas Constitution, Article 11, Section 1(b). We decline to authorize further departure from this standard as that was not the intent of Congress or the express direction from the legislature.

IT IS, THEREFORE, BY THE BOARD OF TAX APPEALS OF THE STATE OF KANSAS, CONSIDERED AND ORDERED that the request for a reduced level of assessment of the appellant's property is denied.

If any party to this appeal feels aggrieved by this decision, they may file a written request for a rehearing with this Board. The written request for rehearing shall set forth specifically and in adequate detail the particular and specific respects in which it is alleged that the Board's order is unlawful, unreasonable, capricious improper or unfair. A copy of the request, together with all documents submitted therewith, shall be mailed to the opposing party at the same time the request is mailed to the Board. Failure to notify the opposing party shall render

any subsequent order voidable. The written request must be received by the Board within fifteen (15) days of the certification date of this order. If, at the end of fifteen days the Board has not received a written request for a rehearing, this order will become a final order from which no further appeal is available.

IT IS SO ORDERED.

[SEAL]

/s/ James P. Davidson
JAMES P. DAVIDSON
Attorney & Secretary

/s/ Jack Shriver
JACK SHRIVER
Chairman

/s/ Maybelle Mertz
MAYBELLE MERTZ
Member

MYRA B. GROSS
Member

/s/ Fred J. Hirsch
FRED J. HIRSCH
Member

/s/ Lawrence L. Tenopir
LAWRENCE L. TENOPIR
Member

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF KANSAS

Richard D. Greene
Morris Laing Evans Brock & Kennedy
200 W Douglas 4th Floor
Wichita, KS 67202-3084

No. 92-69116-AS

IN THE MATTER OF THE APPEAL OF ANR PIPELINE COMPANY; COLORADO INTERSTATE GAS COMPANY; NORTHERN NATURAL GAS COMPANY; MAPCO FRACTIONATOR, INC.; MAPCO AMMONIA PIPELINE, INC.; MID-AMERICA PIPELINE COMPANY; AND ENRON LIQUIDS PIPELINE COMPANY FROM A DECISION OF THE DIRECTOR OF PROPERTY VALUATION OF THE STATE OF KANSAS.

SUPREME COURT ORDER

You are hereby notified of the following action taken by the Court:

> Motion for Rehearing by Colorado Interstate Pipeline, et al. denied.

Date: 03/15/94.

CAROL G. GREEN
Clerk

APPENDIX D

49 U.S.C. § 11503. Tax discrimination against rail transportation property

(a) In this section—

(1) "assessment" means valuation for a property tax levied by a taxing district.

(2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that ex-

ceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in 'controversy or citizenship of the parties,' a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section—

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

Kansas Constitution (1985)

Article 11.

§ 1. (a) System of taxation; classification; exemption. The provisions of this subsection (a) shall govern the assessment and taxation of property until the provisions of subsection (b) of this section are implemented and become effective, whereupon subsection (a) shall expire. The legislature shall provide for a uniform and equal rate of assessment and taxation, except that the legislature may provide for the classification and the taxation uniformly as to class of motor vehicles, mineral products, money, mortgages, notes and other evidence of debt or may exempt any of such classes of property from property taxation and impose taxes upon another basis in lieu thereof. All property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and all household goods and personal effects not used for the production of income, shall be exempted from property taxation.

(b) System of taxation; classification; exemption. (1) The provisions of this subsection (b) shall govern the assessment and taxation of property on and after January 1, 1989, and each year thereafter. Except as otherwise hereinafter specifically provided, the legislature shall provide for a uniform and equal basis of valuation and rate of taxation of all property subject to taxation. The provisions of this subsection (b) shall not be applicable to the taxation of motor vehicles, except as otherwise hereinafter specifically provided, mineral products, money, mortgages, notes and other evidence of debt and grain. Property shall be classified into the following classes for the purpose of assessment and assessed at the percentage of value prescribed therefor:

Class 1 shall consist of real property. Real property shall be further classified into four subclasses. Such property shall be defined by law for the purpose of subclassifi-

cation and assessed uniformly as to subclass at the following percentages of value:

(A) Real property used for residential purposes including multi-family residential real property 12%

(B) Land devoted to agricultural use which shall be valued upon the basis of its agricultural income or agricultural productivity pursuant to section 12 of article II of the constitution 30%

(C) Vacant lots 12%

(D) All other urban and rural real property not otherwise specifically subclassified 30%

Class 2 shall consist of tangible personal property. Such tangible personal property shall be further classified into six subclasses, shall be defined by law for the purpose of subclassification and assessed uniformly as to subclass at the following percentages of value:

(A) Mobile homes used for residential purposes. 12%

(B) Mineral leasehold interests 30%

(C) Public utility tangible personal property .. 30%

(D) All categories of motor vehicles not defined and specifically valued and taxed pursuant to law enacted prior to January 1, 1985 ..... 30%

(E) Commercial and industrial machinery and equipment which, if its economic life is seven years or more, shall be valued at its retail cost when new less seven-year straight-line depreciation, or which, if its economic life is less than seven years, shall be valued at its retail cost when new less straight-line depreciation over its economic life, except that, the value so obtained for such property, notwithstanding its economic life and as long as such property is being used, shall not be less than 20% of the retail cost when new of such property 20%

(F) All other tangible personal property not otherwise specifically classified 30%

(2) All property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, farm machinery and equipment, merchant's and manufacturer's inventories and livestock and all household goods and personal effects not used for the production of income, shall be exempted from property taxation.